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Attorneys for Plaintiffs  
and the proposed class

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

THEODORE KAGAN, JAMES AVEN,  
FRANCES LEVY, ELAINE SOFFA,  
JOSEPH SOFFA, and ALBERKRACK  
FAMILY LIMITED PARTNERSHIP, on  
behalf of themselves and all others similarly  
situated,

Plaintiff,

vs.

WACHOVIA SECURITIES, L.L.C., a North  
Carolina limited liability company;  
WACHOVIA SECURITIES FINANCIAL  
NETWORK, L.L.C., a North Carolina  
limited liability company; WACHOVIA  
CAPITAL MARKETS, L.L.C., a North  
Carolina limited liability company; WELLS  
FARGO ADVISORS, L.L.C., a Delaware  
limited liability company; WELLS FARGO  
ADVISORS FINANCIAL NETWORK,  
L.L.C., a Delaware limited liability  
company; WELLS FARGO SECURITIES,  
L.L.C., a Delaware limited liability  
company; WELLS FARGO & COMPANY, a  
Delaware corporation; and DOES 1 through  
10, inclusive,

Defendants.

Case No. CV 09 5337 SC

Hon. Samuel Conti

**FIRST AMENDED CLASS ACTION  
COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiffs, THEODORE KAGAN, JAMES AVEN, FRANCES LEVY, ELAINE SOFFA,  
 2 JOSEPH SOFFA, and ALBERKRACK FAMILY LIMITED PARTNERSHIP (“Plaintiffs”),  
 3 individually and on behalf of the Class described below, by their attorneys, make the following  
 4 allegations based upon information and belief, except as to allegations specifically pertaining to  
 5 Plaintiffs and their counsel, which are based on personal knowledge. Plaintiffs bring this action  
 6 for damages against Defendants, demanding a trial by jury.

### 7 8 NATURE OF THE ACTION

9 1. Plaintiffs bring this class action against Defendants WACHOVIA SECURITIES,  
 10 L.L.C., WACHOVIA SECURITIES FINANCIAL NETWORK, L.L.C., WACHOVIA  
 11 CAPITAL MARKETS, L.L.C., WELLS FARGO ADVISORS, L.L.C., WELLS FARGO  
 12 ADVISORS FINANCIAL NETWORK, L.L.C., WELLS FARGO SECURITIES, L.L.C., and  
 13 WELLS FARGO & COMPANY (“Wachovia”) to recover damages and other relief available at  
 14 law and in equity on behalf of themselves as well as on behalf of the members of the following  
 15 class:

16 *All individuals and entities who were members of the Asia Pulp &*  
 17 *Paper Securities Litigation Settlement Class and who were the*  
 18 *beneficial owners of Asia Pulp & Paper securities held by*  
 19 *Wachovia.*

20 2. In August 2001, Asia Pulp and Paper Company, Ltd. was sued in the United  
 21 States District Court for the Southern District of New York for making materially false and  
 22 misleading statements in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of  
 23 1934, Rule 10b-5 promulgated thereunder, and Sections 11, 12(A)(2) and 15 of the Securities  
 24 Act of 1933. The parties to the litigation reached a class settlement which was preliminarily  
 25 approved by the District Court on October 18, 2005.

26 3. This action arises from the fact that Wachovia, as the nominee purchaser, failed to  
 27 give notice to the beneficial owners of Asia Pulp & Paper securities, as ordered by the District  
 28 Court in its Order preliminarily approving the class settlement. This failure resulted in the

beneficial owners losing any chance of recovery under the settlement agreement.

### THE PARTIES

2. Plaintiff Theodore Kagan (“Plaintiff Kagan”) is a resident of Marin County, California. He was the beneficial owner of Asia Pulp & Paper securities held by Wachovia.

3. Plaintiff James Aven (“Plaintiff Aven”) is a resident of Bristol County, Massachusetts. He was the beneficial owner of Asia Pulp & Paper securities held by Wachovia.

4. Plaintiff Frances Levy (“Plaintiff Levy”) is a resident of Tulare County, California. She is the trustee of the Laura A. Jacobs Trust, which was the beneficial owner of Asia Pulp & Paper securities held by Wachovia.

5. Plaintiff Elaine Soffa is a resident of Clark County, Nevada. She was the beneficial owner of Asia Pulp & Paper securities held by Wachovia.

6. Plaintiff Joseph Soffa is a resident of Clark County, Nevada. He was the beneficial owner of Asia Pulp & Paper securities held by Wachovia.

7. Plaintiff Alberkrack Family Limited Partnership (“Plaintiff Alberkrack Family LP”) is a Nevada limited partnership. It was the beneficial owner of Asia Pulp & Paper securities held by Wachovia.

8. Plaintiffs are informed and believe and thereon allege that defendant Wachovia Securities, L.L.C. is a North Carolina limited liability company doing business in the State of California. Wachovia Securities, L.L.C.’s principal place of business is located in Virginia.

9. Plaintiffs are informed and believe and thereon allege that defendant Wachovia Securities Financial Network, L.L.C. is a North Carolina limited liability company doing business in the State of California. Wachovia Securities Financial Network, L.L.C.’s principal place of business is located in Virginia.

10. Plaintiffs are informed and believe and thereon allege that defendant Wachovia Capital Markets, L.L.C. is a North Carolina limited liability company doing business in the State of California. Wachovia Securities Capital Markets, L.L.C.’s principal place of business is located in North Carolina.



1 State of California; and (3) a substantial number of the members of the proposed class are  
2 citizens of a state different from that of defendants.

3 17. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391, as a  
4 substantial part of the events giving rise to the claims asserted herein occurred in the Northern  
5 District of California.

### 6 7 **FACTUAL BACKGROUND**

8 18. Under common industry practice, most publicly traded stock is held in the "street  
9 name" of brokerage houses for the benefit of their customers. Only brokerage houses or other  
10 "record owners" appear on official corporate transfer records. The actual interest in the stock  
11 (and consequently, the interest in any lawsuit relating to the stock) is that of the beneficial owner.

12 19. On August 8, 2001, Asia Pulp & Paper Company, Ltd. ("APP") was sued in the  
13 United States District Court for the Southern District of New York. The case was entitled  
14 *Hertzberg, et al. v. Asia Pulp & Paper Company, Ltd., et al.*, No. 01 Civ. 7351 (LAK). The case  
15 was eventually consolidated with 11 other cases under the caption *In re Asia Pulp & Paper*  
16 *Securities Litigation*, Master File No. 00 Civ. 7351 (LAK) ("APP Litigation"). The consolidated  
17 complaint alleged that the plaintiffs and other members of the class purchased or acquired  
18 publicly traded securities of APP at artificially inflated prices as a result of APP's dissemination  
19 of materially false and misleading statements in violation of Sections 10(b) and 20(a) of the  
20 Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and Sections 11, 12(A)(2)  
21 and 15 of the Securities Act of 1933.

22 20. After more than three years of litigation, the parties to the APP Litigation reached  
23 a settlement agreement. The parties entered into a Stipulation of Settlement on October 11, 2005  
24 and the District Court preliminarily approved the settlement on October 18, 2005.

25 21. The October 18, 2005 Order preliminarily approving the settlement included the  
26 following provision:

27 The Claims Administrator shall use reasonable efforts to give  
28 notice to nominee owners such as brokerage firms and other

persons or entities who purchased APP Instruments during the Class Period as record owners but not as beneficial owners. *Such nominee purchasers are directed, within seven (7) days of receipt of the Notice, to either forward copies of the Notice and Proof of Claim to their beneficial owners, or to provide the Claims Administrator with lists of the names and address of the beneficial owners, and the Claims Administrator is ordered to send the Notice and Proof of Claim promptly to such identified beneficial owners.*

[Exhibit A (emphasis added).]

22. The Notice of Pendency of Class Action and Proposed Settlement (“Official Notice”), as approved by the District Court and dated November 30, 2005, contained the following:

**SPECIAL NOTICE TO SECURITIES BROKERS AND  
OTHER NOMINEES**

If you purchased any of the APP Instruments (as specified in response to question 1 on page 4 hereinabove) of Asia Pulp & Paper Company, Ltd. (“APP”) and its subsidiaries during the period between August 28, 1998 and April 4, 2001, inclusive, for the beneficial interest of a person or organization other than yourself, the Court has directed that, WITHIN SEVEN (7) DAYS OF YOUR RECEIPT OF THIS NOTICE, you either (a) provide to the Claims Administrator the name and last known address of each person or organization for whom or which you purchased such stock during such time period or (b) request additional copies of this Notice and the Proof of Claim form, which will be provided to you free of charge, and within seven (7) days mail the Notice and Proof of Claim form directly to the beneficial owners of the

1 securities referred to herein. If you choose to follow alternative  
2 procedure (b), the Court has directed that, upon such mailing, you  
3 send a statement to the Claims Administrator confirming that the  
4 mailing was made as directed. You are entitled to reimbursement  
5 from the Settlement Fund of your reasonable expenses actually  
6 incurred in connection with the foregoing, including  
7 reimbursement of postage expense and the cost of ascertaining the  
8 names and addresses of beneficial owners. Those expenses will be  
9 paid upon request and submission of appropriate supporting  
10 documentation.

11 [Exhibit B.]

12 23. Wachovia, as the nominal owner of APP securities for Plaintiffs and the Class,  
13 had a duty to comply with the court ordered notice provisions of the APP Litigation settlement.

14 24. Wachovia failed to either forward notice of the APP Litigation settlement to  
15 Plaintiffs and the Class or to identify Plaintiffs and the Class so that notice could have been sent  
16 by the settlement administrator.

17 25. Plaintiff Kagan was the beneficial owner of APP securities held by Wachovia.  
18 Plaintiff Kagan never received notice of the APP Litigation settlement. Plaintiff Kagan would  
19 have submitted a claim for and obtained a recovery under the APP Litigation settlement had  
20 Wachovia complied with the notice procedure ordered by the District Court.

21 26. Plaintiff Kagan was unaware of the APP Litigation. Plaintiff Kagan did not see  
22 the notice of class settlement published in either the *Wall Street Journal* or the *Financial Times*  
23 on an unknown date between October 13, 2005 and February 27, 2006. Plaintiff Kagan only  
24 learned of the settlement in the Summer of 2009 when he learned from his financial advisor that  
25 there was a settlement of the APP Litigation.

26 27. Plaintiff Aven was the beneficial owner of APP securities held by Wachovia.  
27 Plaintiff Aven never received notice of the APP Litigation settlement. Plaintiff Aven would  
28 have submitted a claim for and obtained a recovery under the APP Litigation settlement had

1 Wachovia complied with the notice procedure ordered by the District Court.

2 28. Plaintiff Aven was unaware of the APP Litigation. Plaintiff Aven did not see the  
3 notice of class settlement published in either the *Wall Street Journal* or the *Financial Times* on  
4 an unknown date between October 13, 2005 and February 27, 2006. Plaintiff Aven only learned  
5 of the settlement in the Summer of 2009 when he learned from his financial advisor that there  
6 was a settlement of the APP Litigation.

7 29. Plaintiff Levy is the trust of the Laura A. Jacobs Trust, which was the beneficial  
8 owner of APP securities held by Wachovia. Plaintiff Levy never received notice of the APP  
9 Litigation settlement. Plaintiff Levy would have submitted a claim for and obtained a recovery  
10 under the APP Litigation settlement had Wachovia complied with the notice procedure ordered  
11 by the District Court.

12 30. Plaintiff Levy was unaware of the APP Litigation. Plaintiff Levy did not see the  
13 notice of class settlement published in either the *Wall Street Journal* or the *Financial Times* on  
14 an unknown date between October 13, 2005 and February 27, 2006. Plaintiff Levy only learned  
15 of the settlement in the Summer of 2009 when she learned from her financial advisor that there  
16 was a settlement of the APP Litigation.

17 31. Plaintiff Elaine Soffa was the beneficial owner of APP securities held by  
18 Wachovia. Plaintiff Elaine Soffa never received notice of the APP Litigation settlement.  
19 Plaintiff Elaine Soffa would have submitted a claim for and obtained a recovery under the APP  
20 Litigation settlement had Wachovia complied with the notice procedure ordered by the District  
21 Court.

22 32. Plaintiff Elaine Soffa was unaware of the APP Litigation. Plaintiff Elaine Soffa  
23 did not see the notice of class settlement published in either the *Wall Street Journal* or the  
24 *Financial Times* on an unknown date between October 13, 2005 and February 27, 2006. Plaintiff  
25 Elaine Soffa only learned of the settlement in the Summer of 2009 when she learned from her  
26 financial advisor that there was a settlement of the APP Litigation.

27 33. Plaintiff Joseph Soffa was the beneficial owner of APP securities held by  
28 Wachovia. Plaintiff Joseph Soffa never received notice of the APP Litigation settlement.



1 Plaintiff Joseph Soffa would have submitted a claim for and obtained a recovery under the APP  
 2 Litigation settlement had Wachovia complied with the notice procedure ordered by the District  
 3 Court.

4 34. Plaintiff Joseph Soffa was unaware of the APP Litigation. Plaintiff Joseph Soffa  
 5 did not see the notice of class settlement published in either the *Wall Street Journal* or the  
 6 *Financial Times* on an unknown date between October 13, 2005 and February 27, 2006. Plaintiff  
 7 Joseph Soffa only learned of the settlement in the Summer of 2009 when he learned from his  
 8 financial advisor that there was a settlement of the APP Litigation.

9 35. Plaintiff Alberkrack Family LP was the beneficial owner of APP securities held  
 10 by Wachovia. Plaintiff Alberkrack Family LP never received notice of the APP Litigation  
 11 settlement. Plaintiff Alberkrack Family LP would have submitted a claim for and obtained a  
 12 recovery under the APP Litigation settlement had Wachovia complied with the notice procedure  
 13 ordered by the District Court.

14 36. Plaintiff Alberkrack Family LP was unaware of the APP Litigation. Plaintiff  
 15 Alberkrack Family LP did not see the notice of class settlement published in either the *Wall*  
 16 *Street Journal* or the *Financial Times* on an unknown date between October 13, 2005 and  
 17 February 27, 2006. Plaintiff Alberkrack Family LP only learned of the settlement in the Summer  
 18 of 2009 when it learned from its financial advisor that there was a settlement of the APP  
 19 Litigation.

## 20 21 CLASS ACTION ALLEGATIONS

22 37. Description of the Class: Plaintiffs bring this nationwide class action on behalf of  
 23 themselves and a Class defined as follows:

24 *All individuals and entities who were members of the Asia Pulp &*  
 25 *Paper Securities Litigation Settlement Class and who were the*  
 26 *beneficial owners of Asia Pulp & Paper securities held by*  
 27 *Wachovia.*

28 38. Excluded from the Class are governmental entities, Defendants, any entity in

1 which Defendants have a controlling interest, and Defendants' officers, directors, affiliates, legal  
2 representatives, employees, co-conspirators, successors, subsidiaries, and assigns. Also excluded  
3 from the Class is any judge, justice, or judicial officer presiding over this matter and the  
4 members of their immediate families and judicial staff.

5 39. Plaintiffs reserve the right to modify the Class description and the Class period  
6 based on the results of discovery.

7 40. Plaintiffs and the Class bring this action for equitable, injunctive and declaratory  
8 relief pursuant to subdivisions (b)(1), (b)(2) and (b)(3) of rule 23 of the Federal Rules of Civil  
9 Procedure.

10 41. Numerosity: The proposed Class is so numerous that individual joinder of all its  
11 members is impracticable. The total number of Class members is at least in the thousands and  
12 members of the class are geographically dispersed across the United States. While the exact  
13 number and identities of the Class members are unknown at this time, such information can be  
14 ascertained through appropriate investigation and discovery. The disposition of the claims of the  
15 Class members in a single class action will provide substantial benefits to all parties and to the  
16 Court.

17 42. Common Questions of Law and Fact Predominate: There are questions of law  
18 and fact common to the representative Plaintiffs and the Class, and those questions substantially  
19 predominate over any questions that may affect individual Class members. Common questions  
20 of fact and law include, but are not limited to, the following:

21 a. Whether Wachovia was negligent by failing to comply with the notice  
22 procedure ordered under the APP Litigation settlement;

23 b. Whether Wachovia breach its fiduciary duties to Plaintiffs and the Class  
24 by failing to comply with the notice procedure ordered under the APP Litigation  
25 settlement;

26 c. Whether Wachovia breached its contract with Plaintiffs and the Class by  
27 failing to comply with the notice procedure ordered under the APP Litigation settlement;  
28 and

1           d.       Whether the failure to comply with the notice procedure ordered under the  
2       APP Litigation settlement caused Plaintiffs' and the Class' damages.

3       43.   Typicality: Plaintiffs' claims are typical of the claims of the members of the  
4       class. Plaintiffs and all members of the class have been similarly affected by Defendants'  
5       common course of conduct since their printers acted in exactly the same way.

6       44.   Adequacy of Representation: Plaintiffs will fairly and adequately represent and  
7       protect the interests of the Class. Plaintiffs have retained counsel with substantial experience in  
8       prosecuting complex and class action litigation. Plaintiffs and their counsel are committed to  
9       vigorously prosecuting this action on behalf of the Class, and have the financial resources to do  
10      so. Neither Plaintiffs nor their counsel have any interests adverse to those of the Class.

11      45.   Superiority of a Class Action: Plaintiffs and the members of the Class suffered,  
12      and will continue to suffer, harm as a result of Defendants' unlawful and wrongful conduct. A  
13      class action is superior to other available methods for the fair and efficient adjudication of the  
14      present controversy. Individual joinder of all members of the class is impractical. Even if  
15      individual class members had the resources to pursue individual litigation, it would be unduly  
16      burdensome to the courts in which the individual litigation would proceed. Individual litigation  
17      magnifies the delay and expense to all parties in the court system of resolving the controversies  
18      engendered by Defendants' common course of conduct. The class action device allows a single  
19      court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable  
20      handling of all class members' claims in a single forum. The conduct of this action as a class  
21      action conserves the resources of the parties and of the judicial system, and protects the rights of  
22      the class member. Furthermore, for many, if not most, class members, a class action is the only  
23      feasible mechanism that allows therein an opportunity for legal redress and justice.

24      46.   Adjudication of individual class members' claims with respect to the Defendants  
25      would, as a practical matter, be dispositive of the interests of other members not parties to the  
26      adjudication, and could substantially impair or impede the ability of other class members to  
27      protect their interests.

**FIRST CAUSE OF ACTION**

**NEGLIGENCE**

47. Plaintiffs reallege the preceding paragraphs as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

48. Defendants were the nominal owners of APP securities for Plaintiffs and the Class.

49. Defendants had the duty, pursuant to an order of the District Court, to follow the notice procedure outlined in the Official Notice of the settlement of the APP Litigation.

50. Defendants breached that duty by failing to either forward Official Notice of the APP Litigation settlement to Plaintiffs and the Class or to identify Plaintiffs and the Class so that Official Notice could have been sent by the settlement administrator.

51. As a direct and proximate cause of Defendants failure to comply with the notice requirements of the APP Litigation settlement, Plaintiffs and the Class have been damaged in an amount to be shown at trial.

WHEREFORE, Plaintiffs and the Class pray for relief as set forth below.

**SECOND CAUSE OF ACTION**

**BREACH OF FIDUCIARY DUTY**

52. Plaintiffs reallege the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

53. Defendants were the nominal owners of APP securities.

54. Defendants held the APP securities for the benefit of Plaintiffs and the Class.

55. On the basis of this relationship, Defendants owed Plaintiffs and the Class the fiduciary duty of due care.

56. Defendants breached the fiduciary duty owed to Plaintiffs and the Class by failing to either forward Official Notice of the APP Litigation settlement to Plaintiffs and the Class or to identify Plaintiffs and the Class so that Official Notice could have been sent by the settlement administrator.

57. As a direct and proximate cause of Defendants failure to comply with the notice requirements of the APP Litigation settlement, Plaintiffs and the Class have been damaged in an amount to be shown at trial.

WHEREFORE, Plaintiffs and the Class pray for relief as set forth below.

### THIRD CAUSE OF ACTION

## BREACH OF CONTRACT

58. Plaintiffs reallege the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

59. Plaintiffs and the Class entered into a contract with Defendants for brokerage services.

60. One of the terms of the brokerage services agreement was that Defendants would provide Plaintiffs and the Class with all relevant information and communications they receive pertaining to Plaintiffs' and the Class' securities, including those held in Defendants' name for the benefit of Plaintiffs and the Class.

61. Defendants breached its contracts with Plaintiffs and the Class by failing to either forward Official Notice of the APP Litigation settlement to Plaintiffs and the Class and/or to identify Plaintiffs and the Class so that Official Notice could have been sent by the settlement administrator.

62. As a direct and proximate cause of Defendants failure to comply with the notice requirements of the APP Litigation settlement, Plaintiffs and the Class have been damaged in an amount to be shown at trial.

WHEREFORE, Plaintiffs and the Class pray for relief as set forth below.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and members of the Class request that the Court enter an order or judgment against the Defendant as follows:

1. Certification of the proposed class and notice thereto to be paid by Defendants;

2. Adjudge and decree that Defendants has engaged in the conduct alleged herein;
3. For restitution and disgorgement on certain causes of action;
4. For compensatory and general damages according to proof on certain causes of action;
5. For special damages according to proof on certain causes of action;
6. For both pre and post-judgment interest at the maximum allowable rate on any amounts awarded;
7. Costs of the proceedings herein;
8. Reasonable attorneys fees as allowed by statute; and
9. Any and all such other and further relief that this Court may deem just and proper.

DATED: August 6, 2010      **KABATECK BROWN KELLNER LLP**

By: \_\_\_\_\_/s/

Brian S. Kabateck  
Richard L. Kellner  
Alfredo Torrijos  
*Counsel for Plaintiffs and the proposed class*

**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury in the instant action.

DATED: August 6, 2010      **KABATECK BROWN KELLNER LLP**

By: \_\_\_\_\_/s/

Brian S. Kabateck

Richard L. Kellner

Alfredo Torrijos

*Counsel for Plaintiffs and the proposed class*